

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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JUL 3 - 2007

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In the Matter of	)	
	)	
Massillon Cable TV, Inc.	)	CSR-7229-Z
	)	
Request for Waiver of Section 76.1204(a)(1) of	)	
the Commission's Rules	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of	)	
Navigation Devices	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 29, 2007**

**Released: June 29, 2007**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. Massillon Cable TV, Inc. ("Massillon") has filed with the Chief of the Media Bureau the above-captioned request for waiver (the "Waiver Request") of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules for the Motorola DCT-700, Motorola DCT-3416, and Pace Tahoe HD-DVR integrated set-top boxes.<sup>1</sup> Massillon seeks to place these integrated set-top boxes into service after the July 1, 2007 deadline. For the reasons stated below, we deny Massillon's waiver request, but grant Massillon leave to amend its request.<sup>2</sup>

**II. BACKGROUND**

2. Section 629(a) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to:

adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.<sup>3</sup>

<sup>1</sup> 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the host device required by this rule is referred to as the "integration ban."

<sup>2</sup> 47 C.F.R. §§ 1.3, 76.7.

<sup>3</sup> 47 U.S.C. § 549(a).

Through Section 629, Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their MVPD.<sup>4</sup> Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”<sup>5</sup> At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”<sup>6</sup> Similarly, Congress also sought to avoid Commission actions “which could have the effect of freezing or chilling the development of new technologies and services.”<sup>7</sup> Under Section 629(c), therefore, the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services.<sup>8</sup>

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000, a security element separate from the basic navigation device (the “host device”).<sup>9</sup> The integration ban was designed to enable unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. MVPDs were permitted to continue providing equipment with integrated security until January 1, 2005, so long as modular security components, known as point-of-deployment modules (“PODs”),<sup>10</sup> were also made available for use with host devices obtained through retail outlets. In April 2003, in response to a request from cable operators, the Commission extended the effective date of the integration ban until July 1, 2006.<sup>11</sup> Then, in 2005, again at the urging of cable operators,<sup>12</sup> the Commission further extended that date until July 1, 2007.<sup>13</sup> In that decision, the Commission stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”<sup>14</sup>

4. The Media Bureau has acted upon six requests for waiver of Section 76.1204(a)(1) of the Commission’s rules, three on January 10, 2007,<sup>15</sup> and three on May 4, 2007.<sup>16</sup> The Bureau found that

<sup>4</sup> See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004).

<sup>5</sup> H.R. REP. NO. 104-204, at 112 (1995).

<sup>6</sup> *Id.*

<sup>7</sup> S. REP. 104-230, at 181 (1996) (Conf. Rep.).

<sup>8</sup> 47 U.S.C. § 549(c).

<sup>9</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998) (“*First Report and Order*”); 47 C.F.R. § 76.1204(a)(1).

<sup>10</sup> For marketing purposes, PODs are referred to as “CableCARDs.”

<sup>11</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003).

<sup>12</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) (“*2005 Deferral Order*”), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

<sup>13</sup> *2005 Deferral Order*, 20 FCC Rcd at 6814, ¶ 31.

<sup>14</sup> *Id.*

<sup>15</sup> See *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”); *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 220 (2007) (“*Cablevision Order*”); *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 228 (2007) (“*Comcast Order*”). These orders are collectively referred to as the “*January 10 Orders*.”

waiver was not warranted for any of the parties pursuant to Section 629(c) because none of the parties had demonstrated that waiver was necessary to assist in the development or introduction of a new or improved service.<sup>17</sup> The Bureau also found that devices with two-way functionality did not meet the waiver policy announced in the 2005 *Deferral Order* for low-cost, limited-capability set-top boxes.<sup>18</sup> The Bureau found good cause, however, to conditionally grant Bend Cable Communications d/b/a BendBroadband (“BendBroadband”) a waiver of Section 76.1204(a)(1) of the Commission’s rules.<sup>19</sup>

5. In the *BendBroadband* and *GCI Orders*, we also recognized “the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators.”<sup>20</sup> We stated that small operators could request deferral of the July 1, 2007 deadline if they could demonstrate that they have placed orders for compliant set-top boxes<sup>21</sup> that will not be fulfilled in time for them to comply with the deadline.<sup>22</sup>

#### A. The Waiver Request

6. Pursuant to Section 629(c) of the Communications Act,<sup>23</sup> Section 706 of the Telecommunications Act of 1996,<sup>24</sup> and Sections 1.3, 76.7, and 76.1207 of the Commission’s rules,<sup>25</sup> Massillon seeks a waiver of the integration ban to allow it to place into service integrated set-top boxes it will have in inventory after the July 1, 2007 deadline.<sup>26</sup> Massillon states that it is a “small, locally-run, family-owned” cable operator with approximately 46,000 customers.<sup>27</sup> Massillon explains that it invested approximately \$1 million in the purchase and installation of an all-digital headend system.<sup>28</sup> While Massillon planned for this all-digital headend to be in operation by November 2006, it claims that unspecified “software issues” with its major supplier forced it to delay operation until March 2007.<sup>29</sup>

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<sup>16</sup> See *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2008 (MB rel. May 4, 2007) (“*Charter Order*”); *Millennium Telcom, LLC d/b/a OneSource Communications Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2009 (MB rel. May 4, 2007) (“*OneSource Order*”); *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2010 (MB rel. May 4, 2007) (“*GCI Order*”). These orders are collectively referred to as the “*May 4 Orders*.”

<sup>17</sup> *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 11-15; *Cablevision Order*, 22 FCC Rcd at 224-225, ¶¶ 12-16; *Comcast Order*, 22 FCC Rcd at 235-238, ¶¶ 15-23; *Charter Order* at ¶¶ 13-16; *OneSource Order* at ¶ 13.

<sup>18</sup> *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶¶ 16-20; *Comcast Order*, 22 FCC Rcd at 238-241, ¶¶ 24-30; *Charter Order* at ¶ 17; *OneSource Order* at ¶¶ 12-17.

<sup>19</sup> In the *OneSource Order* and the *GCI Order*, the Bureau granted waiver on similar grounds. See *OneSource Order* at ¶¶ 16-18; *GCI Order* at ¶¶ 14-18.

<sup>20</sup> *BendBroadband Order*, 22 FCC Rcd at 212, ¶ 10; see *GCI Order* at ¶ 18.

<sup>21</sup> This includes both low-cost and high-end compliant boxes.

<sup>22</sup> *BendBroadband Order*, 22 FCC Rcd at 212-213, ¶ 10.

<sup>23</sup> 47 U.S.C. § 549(c).

<sup>24</sup> 47 U.S.C. § 157 nt.

<sup>25</sup> 47 C.F.R. §§ 1.3, 76.7, and 76.1207.

<sup>26</sup> Waiver Request at 1.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.*

7. Massillon explains that it has ordered three types of integrated set-top boxes since October 2006: Motorola DCT-700, Motorola DCT-3416, and the Pace Tahoe HD-DVR.<sup>30</sup> With respect to the DCT-700, Massillon states that it ordered 4,200 of these set-top boxes in October 2006 for delivery in December 2006, which it expected to deploy at a rate of 600 per month, thereby providing a sufficient number to meet subscriber demand until June 2007.<sup>31</sup> Massillon claims that the four-month delay in the coming operation of its all-digital headend prevented it from deploying these set-top boxes as planned.<sup>32</sup> As a result, as of June 1, 2007, Massillon had 2,580 DCT-700 set-top boxes remaining in inventory.<sup>33</sup> With respect to the DCT-3416, Massillon explains that it ordered 1,500 of these set-top boxes in January 2007 with an initial delivery of 600 to begin in February 2007 and subsequent deliveries of 300 per month scheduled for March, April, and May 2007.<sup>34</sup> Massillon expected that these quantities would be sufficient to meet subscriber demand through June 2007.<sup>35</sup> Rather than receiving delivery as planned, Massillon asserts that shipments were delayed and that it received more than 1000 DCT-3416 set-top boxes in April 2007 after subscriber demand for the DCT-3416 had subsided.<sup>36</sup> As a result, as of June 1, 2007, Massillon had 580 DCT-3416 set-top boxes remaining in inventory.<sup>37</sup> With respect to the Pace Tahoe HD-DVR, Massillon explains that it ordered 96 of these set-top boxes on February 14, 2007, but that the Pioneer Passport interactive program guide that Massillon uses remains unavailable on these converters.<sup>38</sup> Massillon states that all 96 of these set-top boxes remain in inventory.<sup>39</sup> In total, Massillon claims that as of June 1, 2007, it has an inventory of 3,255 integrated set-top boxes valued at \$473,544.<sup>40</sup> While Massillon expects this inventory to drop significantly by the July 1, 2007 deadline, it nonetheless expects to have integrated set-top boxes remaining in inventory after the deadline.<sup>41</sup>

8. Massillon asserts that it will not receive any further deliveries of integrated set-top boxes.<sup>42</sup> Rather, it seeks a waiver only to exhaust its current inventory.<sup>43</sup> Moreover, Massillon claims that it has placed an order for 300 non-integrated Motorola DCH-3400 set-top boxes to be delivered monthly, but that it does not expect to receive these compliant set-top boxes until the end of July at the earliest or the end of September at the latest.<sup>44</sup>

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<sup>30</sup> *Id.* at 5-7.

<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 8. Massillon calculates this figure based on the following quantities remaining in its inventory: 2,580 Motorola DCT-700 (valued at \$79 each), 580 Motorola DCT-3416 (valued at \$399 each), and 96 Pace Tahoe HD-DVR converter (valued at \$399 each). *Id.* at 8.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 6.

9. Massillon claims that its Waiver Request should be granted under Section 629(c) because it is necessary to assist in the development and introduction of new and improved services.<sup>45</sup> Massillon also asserts that grant of a waiver would serve the public interest by enabling Massillon to recoup its investment in integrated set-top boxes without having a negative impact on the market for navigation devices.<sup>46</sup> Massillon further claims that its waiver request is consistent with the policies set forth in the *BendBroadband* and *GCI Orders*, where we recognized “the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators.”<sup>47</sup>

### III. DISCUSSION

10. Massillon filed its Waiver Request pursuant to Section 629(c) of the Communications Act and Section 76.1207 of the Commission’s rules,<sup>48</sup> as well as the general waiver provisions of Sections 1.3 and 76.7 of the Commission’s rules.<sup>49</sup> For the reasons previously set forth in the *January 10 Orders* and *May 4 Orders*, we decline to grant the Waiver Request under the standard set forth in Section 629(c). We also deny Massillon’s Waiver Request under the general waiver provisions. We note, however, that we will consider whether Massillon qualifies for deferred enforcement of the July 1, 2007 deadline if it complies with the procedures set forth in the *GCI Order*.

#### A. Section 629(c) of the Act

11. Section 629(c) states in relevant part that:

[t]he Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.<sup>50</sup>

As mentioned above, the principal goal of Section 629 of the Act is to foster competition and consumer choice in the market for navigation devices.

12. While Massillon asserts that grant of its Waiver Request is necessary to assist in the development and introduction of new and improved services, it does not demonstrate how grant of its Waiver Request will further these goals.<sup>51</sup> In fact, Massillon states that it has already launched its all-

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<sup>45</sup> *Id.* at 3.

<sup>46</sup> *Id.* at 9.

<sup>47</sup> *Id.* at 9; see *BendBroadband Order*, 22 FCC Rcd at 212, ¶ 10; *GCI Order* at ¶ 18.

<sup>48</sup> Waiver Request at 1. Section 76.1207 of the Commission’s rules, 47 C.F.R. § 76.1207, implements Section 629(c) of the Act and tracks the language of that statutory provision almost verbatim.

<sup>49</sup> Waiver Request at 1. Massillon also filed its Waiver Request pursuant to Section 706 of the Telecommunications Act of 1996, which provides that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” 47 U.S.C. § 157 nt. Massillon makes no attempt to demonstrate, nor do we find, that grant of its Waiver Request would further the goals of Section 706.

<sup>50</sup> 47 U.S.C. § 549(c).

<sup>51</sup> See *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 13-14 (citing Congressional intent for a narrow reading of the waiver provisions of Section 629(c)); *Comcast Order*, 22 FCC Rcd at 236-237, ¶¶ 17-18.

digital network in March 2007.<sup>52</sup> Thus, the waiver could hardly be “necessary” for the “development or introduction” of these services, as they already exist.

13. We conclude, therefore, that grant of the Waiver Request is not “necessary” to assist in the development or introduction of new or improved services. While it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).

#### **B. Sections 1.3 and 76.7 of the Commission’s Rules**

14. Massillon also argues that it is entitled to a waiver pursuant to Sections 1.3 and 76.7 of the Commission’s rules.<sup>53</sup> We disagree. Massillon requests a waiver of the integration ban based on its decision to purchase thousands of integrated set-top boxes less than one year prior to the July 1, 2007 deadline. While we recognize the difficulties Massillon has experienced in deploying digital services, Massillon made a calculated risk that it would be able to place these integrated set-top boxes into service before the July 1, 2007 deadline. Commission precedent is clear that regulated entities are responsible for the consequences that flow from their business decisions.<sup>54</sup> We do not question Massillon’s statements that it did not intend to stockpile integrated equipment and that it reasonably expected to place the integrated boxes into service before the July 1, 2007 deadline.<sup>55</sup> In this case, however, the record is clear that Massillon ordered thousands of integrated set-top boxes rather than compliant, non-integrated set-top boxes for delivery in the months leading up to the July 1, 2007 deadline.<sup>56</sup> For example, Massillon planned deliveries of hundreds of non-compliant DCT-3416 set-top boxes as late as May 2007.<sup>57</sup> Massillon’s decision to order integrated set-top boxes in such close proximity to the July 1, 2007 deadline is not a circumstance beyond its control.<sup>58</sup> Moreover, we disagree with Massillon’s unsupported claim that grant of this waiver will not have a negative impact on the market for navigation devices.<sup>59</sup> The

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<sup>52</sup> Waiver Request at 5.

<sup>53</sup> 47 C.F.R. §§ 1.3, 76.7.

<sup>54</sup> See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petitions for Waiver*, 2007 W.L. 1299111, ¶ 23 (May 2, 2007) (“It is the Commission’s general policy not to grant extensions of compliance deadlines based on matters within the regulated entities’ control, such as business decisions . . .” (citing *MCI Communications Corporation*, 2 FCC Rcd 223, 234 ¶ 7 (1987) and *P&R Temmer v. FCC*, 743 F.2d 918, 930 (D.C. Cir. 1984))).

<sup>55</sup> Waiver Request at 8.

<sup>56</sup> The Commission in 1999 warned that MVPDs “should not use this transition period to increase inventories of integrated devices once separate security modules are widely available.” *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 14 FCC Rcd 7596, 7612-13, ¶ 35 (1999).

<sup>57</sup> Waiver Request at 6.

<sup>58</sup> Massillon claims that its Waiver Request is materially different than certain previous waiver requests because it is seeking to use integrated set-top boxes that it already has in inventory rather than to purchase new integrated set-top boxes. Waiver Request at 8 (citing *BendBroadband* and *OneSource Orders*). We find that this is not a meaningful distinction. Absent countervailing public interest benefits, placing into service new integrated set-top boxes after the July 1, 2007 deadline, regardless of whether they are currently in inventory, will undermine the goal of Congress to establish a competitive market for navigation devices.

<sup>59</sup> Waiver Request at 1, 9.

benefits of the integration ban include consumer savings and technological advances.<sup>60</sup> Moreover, "Congress regarded the commercial availability of navigation devices from independent sources as a benefit in and of itself."<sup>61</sup> Granting a waiver of the integration ban based on a business decision to purchase thousands of integrated set-top boxes less than one year prior to the July 1, 2007 deadline will impede achieving these benefits.

### C. Deferral of July 1, 2007 Deadline

15. We note Massillon's claim that it has ordered non-integrated set-top boxes, but that these boxes will not be delivered until after the July 1, 2007 deadline. In the *BendBroadband* and *GCI Orders*, we recognized "the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators."<sup>62</sup> Consistent with this policy, we will consider whether Massillon qualifies for deferred enforcement of the July 1, 2007 deadline if it complies with the procedures set forth in the *GCI Order*.<sup>63</sup> In that decision, we explained that a small cable operator requesting such a deferral must submit a signed affidavit that: (1) states that it has placed an order for a sufficient number of compliant boxes that, if filled, would satisfy the operator's equipment needs, specifies the number of boxes ordered, and provides information to support its statement that the number of compliant boxes ordered would be sufficient, if the order could be filled; (2) states that the manufacturer has informed it that the order will not be filled by July 1, 2007; (3) sets forth when the order will be filled; (4) requests deferral of the integration ban until that time; (5) states that it intends to order only enough integrated boxes to meet its needs until compliant boxes can be obtained, indicates how many such boxes it will be ordering and provides information to support those numbers; and (6) attaches all relevant documentation, including order forms and correspondence with its manufacturers.<sup>64</sup>

## IV. CONCLUSION

16. For these reasons, we conclude that Massillon's Waiver Request, as submitted, does not justify a waiver under Section 629(c) of the Communications Act or Section 76.1207 of the Commission's rules or under the general waiver provisions of Sections 1.3 and 76.7 of the Commission's rules. Accordingly, we deny the Waiver Request. However, we grant Massillon leave to file an amended waiver request that seeks deferral of the July 1, 2007 deadline based on the policies and procedures established in the *BendBroadband* and *GCI Orders*.

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<sup>60</sup> *Comcast Order*, 22 FCC Rcd at 241 n.109.

<sup>61</sup> *Charter Communications, Inc. v. FCC*, No. 460 F.3d 31, 42 (D.C. Cir. 2006) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29).

<sup>62</sup> *BendBroadband Order*, 22 FCC Rcd 209, 212, ¶ 10; *GCI Order* at ¶ 18.

<sup>63</sup> While Massillon claims that its Waiver Request is "by and large, a deferment request" consistent with the policies established in the *BendBroadband* and *GCI Orders*, Massillon has not provided the required affidavit discussed in the *GCI Order*. Waiver Request at 9.

<sup>64</sup> *GCI Order* at ¶ 18. We explained that we will treat this documentation as confidential upon the operator's request, consistent with our rules and policies regarding confidential information. *Id.* See generally 47 C.F.R. § 0.459; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998).

**V. ORDERING CLAUSES**

17. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, the request of Massillon Cable TV, Inc. ("Massillon") for a waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**, to the extent described above.

18. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai  
Chief, Media Bureau